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No. 82-721

In The

Supreme Court of the United States

October Term, 1982

JAMES C. GABRIEL, Pro Se,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M.M. HENNELLY, JOHN H. LLOYD, D.B. JENKS and THOMAS J. O'LEARY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

Reply to argument that Judge Lacey's order from which this appeal is taken, denied petitioner's fourth motion for reconsideration of Judge Sarokin's order of April 7, 1981.

The fourth motion for reconsideration was authorized by the Rules of the New Jersey District Court Rule 12-I This Rule 12-I states as follows:

> "Rule 12-I. A motion for reargument shall be served and filed within 14 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice, a memorandum setting forth concisely the matters

> or controlling decisions which counsel believes the Court has overlooked."

Petitioner followed Rule 12-I, serving with the memorandum concisely the matters or controlling decisions which petitioner believed the court had overlooked. In addition, petitioner was seeking the court's permission to have his first — one and only day in court before Judge Sarokin and before respondents' attorneys in order to thrash out his jury trial case in open court. Judge Sarokin denied petitioner even one day in the judge's court in the presence of respondents' attorneys.

Petitioner's complaint dated July 3, 1978, was to have a jury of his peers evaluate his property of MoPac Class B equity bearing common shares under due process of law according to the Fifth and Fourteenth Amendments. The Fifth Amendment states as follows:

> "No person shall be deprived of life, liberty, or property without due process of law".

Petitioner's complaint was to have a jury trial under Rule 38, Jury Trial of Right — (a) Right Preserved. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." (d). . . "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties". But Honorable Judge Sarokin had taken my Jury Rule 38, Jury Trial of Right case and instead of having a jury try my complaint No. 78-1476 in the United States District Court, District of New Jersey, the Honorable Judge gave petitioner's jury trial case to a magistrate to decide because Judge Sarokin told petitioner that he had "a heavy case load," and he was obliged to give it to a magistrate instead.

Judge Sarokin's order, permanently enjoining petitioner from instituting suit in the federal court against these respondents

regarding any matter alleged in the complaint that deals with the 1974 recapitalization of Missouri Pacific Railroad is against petitioner's constitutional rights to due process evaluation of his Class B property according to the Fifth and Fourteenth Amendments to the United States Constitution and according to Section 19a (49 U.S.C. §19a) "Valuation of Property of Carriers," to find the true value of petitioner's Class B shares in order to have them exchanged into new MoPac common shares. This is in accordance to the Supreme Court's holding in *Schwabacher v. United States,* 334 U.S. 201, where the terms of the plan of recapitalization of 1973-1974 had been imposed by the management interests which were adverse to petitioner's Class B MoPac common stock interests because Mississippi River Corporation, who concocted the 1974 Plan of Recapitalization was the owner of 63% or 1,158,395 shares of MoPac Class A $5 preferred $100 per share value stocks. Mississippi River Corporation has since 1963 elected the Board of Directors of Missouri Pacific Railroad (MoPac). Mississippi River Corporation which controlled MoPac's management and Board of Directors, had directed its Board of Directors to make an application to the I.C.C. under Section 20a (49 U.S.C. §20a) of the Interstate Commerce Act, to convert Mississippi own 63% Class A $5 preferred $100 per share value stocks and all other Class A stocks owned by others, into new MoPac Common equity bearing stocks, share for share, so that the Class A stockholders' equity of 34.5% on an I.C.C. accounting basis which was attributable to the Class A $5 preferred $100 per share value stocks was increased by the Plan of Recapitalization of 1974 to 74.5% of MoPac's equity, and the equity attributable to the Class B equity bearing common stocks was decreased from 65.5% to 25.5%.

Therefore, petitioner had voted against the 1974 Plan of Recapitalization because he did not wish to be plundered out of over 60% of his Class B equity, to have his Class B equity decreased from 65.5% to 25.5%, but petitioner instead sought due process evaluation of his Class B stocks according to the Fifth and Fourteenth Amendments — "No person shall be deprived

of life, liberty, or property, without due process of law," and according to *Schwabacher v. United States,* 334 U.S. 201, which states: "The Commission is under the duty to see that the minority interests are protected."

Honorable Judge Lacey did commit error in:

Directing the clerk not to accept, nor to docket nor to submit to the court any further papers in this case from petitioner except for notice of appeal which was done by the judge on defendants' advice in order to help demoralize petitioner by stopping him from defending his case which was a jury trial, Rule 38 Jury Trial Right case, but it was made into a magistrate's case by the Honorable Judge Sarokin because the judge told petitioner that he had a "heavy caseload." This was no valid excuse to make a jury trial case (Rule 38) into a magistrate's case. Thus, the judge was violating petitioner's rights to a jury trial according to Rule 38 — (a) Right Preserved. (d) "A demand for trial by jury as hereby provided may not be withdrawn without the consent of the parties."

All that petitioner was seeking was a jury trial for due process evaluation of his MoPac Class B common stocks under the Fifth and Fourteenth Amendments and under Section 19a of the Act for Valuation of Property of Carriers , to find petitioner's Class B true value, to exchange his Class B stock values into new MoPac common stock, true Class B values exchanged into new MoPac common stocks — which is according to the United States Supreme Court's holding in *Schwabacher v. United States,* 334 U.S. 201.

Petitioner denies respondents'statement that petitioner owns what was formerly Class B stock. In 1973 the 1974 Recapitalization Plan petitioner had voted against giving up his MoPac Class B stocks for a value of $2,450 per share, so that by voting against the approval of the MoPac Plan of Recapitalization on June 15, 1973, petitioner was seeking instead a due process evaluation of his Class B shares under the Fifth and Fourteenth Amendments,

in order to exchange his Class B common stocks into new MoPac common stocks, equal value for equal value, which is according to *Schwabacher v. United States,* 334 U.S. 201.

The federal courts never decided that plaintiff dissenter had no right to due process of law. To hold plaintiff dissenter in a class action is against due process of law. Due process of law had not been litigated, neither by the federal courts nor by the Interstate Commerce Commission. Plaintiff dissenter has a right to due process in accord with the principle of due process.

The prior case of *Levin v. Mississippi* never adjudicated the issues of the rights of a stockholder to be protected by the law in having the full market value of his property preserved under our principles of protecting property under due process. A property owner cannot have his property taken away from him at a price and a value arbitrarily established for settlement purposes and accepted by a majority of his stockholders. The plaintiff having dissented from the arbitrary value is entitled to his property properly evaluated under due process principles.

In this action the plaintiff dissenter having preserved his rights throughout the period of recapitalization and having voted against the Recapitalization Plan seeks to have his Class B stock evaluated in accord with the principle of due process.

What has not been adjudicated and is not res judicata is the right of the plaintiff dissenter to the Recapitalization Plan to have his stock evaluated. The plaintiff dissenter's rights to the true value of his property cannot be arbitrarily taken away from him either by a court judgment or by a vote of a majority of his fellow stockholders. The *Levin* Court never purported to set the actual value of the Class B stock, and never held that dissenters to the Recapitalization Plan were to be deprived of an objective evaluation of their property.

Neither the order of Judge Weinfeld, the vote of approval by the majority of MoPac stockholders, or the approval by the I.C.C. of the Recapitalization Plan, did or legally deprive plaintiff dissenter from his rights to have his property evaluated under due process of law.

The activity involved was one of recapitalization not condemnation of plaintiff's stocks. If plaintiff's fellow stockholders were satisfied to accept an agreed price for their property, that was their business. They had no authority to force an evaluation of plaintiff's property.

This nation is based on sanctity of private ownership, and no fellow stockholder could by a Recapitalization Plan fix the price of dissenting plaintiff's stock without his consent.

Judge Lacey's conclusion was not according to Rule 12-I of the New Jersey District Court Rules, when he stated that Rule 12-I authorized only a single motion for reargument. Petitioner was told by the court clerk supervisor that there is no limit for the number of motions and affidavits made providing you follow Rule 12-I of the New Jersey court rules. By reading Rule 12-I one can see that this is the case.

My brother Napoleon's case has nothing to do with my MoPac case in New Jersey. All these sanctions against petitioner by the Hon. Lacey's court suggested to the honorable judge by respondents, who up to now owe the United States government I.R.S. the sum of about $150,000,000 in capital gains taxes for the transfer of $615,000,000 to $800,000,000 in MoPac Class B cash and property values to the Class A. 63% of Class A $5 preferred stocks were owned by Mississippi River Corp. Mississippi River Corp. had gained over $250,000,000 in cash and property values by their Recapitalization Plan of 1973-1974 that Mississippi had concocted in order to plunder Class B stockholders' stocks.

In a jury trial case somewhat similar to the present case, Mr. Justice Black delivered the opinion of the Court in *Beacon Theatres*

v. Westover, U.S. District Judge, et al., 359 U.S. 500, in which he stated:

> "We granted certiorari, 356 U.S. 956, because maintenance of the jury as a factfinding body is of such importance that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost case." *Dimick v. Schiedt*, 293 U.S. 474, 486.

It is not frivolous or vexatious or abusive nor is it a vendetta nor harassment to seek due process evaluation of petitioner's Class B property under the Fifth and Fourteenth Amendments.

There was a conflict of interest by Alleghany Corporation because Alleghany kept its transaction on the Jones Motor Company Control and Pu[illegible]se and Control Erie Trucking Company, No. MC-F-10444, a secret from the Minority Class B. MPRR Common stockholders whom Alleghany was representing as a plaintiff in a MPRR Class Action under Rule 23(a), (b)(1) and (b)(2) of the Fed. Rules of Civil Procedure, for better Class B dividends as ordered by U.S.,D.J. Frederick van Pelt Bryan, dated N.Y., N.Y. October 9, 1968, with no intervenors after December 20, 1968, and then four years later the Class Action was made into a Plan of Recapitalization on the same pleadings of better dividends. *Alleghany was obliged to sell its Class B stocks in bulk at a cheap value in order to remain as a motor carrier subject to the plenary jurisdiction of the I.C.C. under part II of the Act in order to save itself from the annual 70% IRS penalty tax* because less than five individuals owned more that 50% of the Alleghany stock, but as a motor carrier subject to the plenary jurisdiction of the I.C.C. it was not subject to this penalty IRS annual tax. In addition, as a motor carrier, Alleghany was not subject to the *S.E.C.'s federal rules on securities.* Alleghany also kept these facts a secret from the Weinfeld court. As a Class B Minority stockholder representative, *Alleghany did not adequately and fairly protect the interests of the Class B stockholders; thus*

it violated Rule 28 and Rule 23 and Rule 23.1 of F.R.C.P. This action by Alleghany was fraud, which voids the MoPac class action under Class Action Rule 23.

Class Actions. — (a) Prerequisites to a Class Action. (4) "the representative parties will fairly and adequately protect the interets of the class." Alleghany did not protect the interests of Class B. *Since Alleghany's Voting Right Litigation Victory, in Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1967), its ownership of the majority of Class B stocks gave Alleghany independent veto power over corporate action that required separate approval of B stock. *This was against the I.C.C.'s rules for a motor carrier such as Alleghany to have such control of MPRR.* So Alleghany had to sell its Class B stocks in bulk cheap to Mississippi River Corp. quickly, in order to remain under the I.C.C.'s plenary jurisdiction to save taxes and *money*, but Alleghany kept these above facts a secret. The fact that Alleghany kept these facts a secret in a Rule 23 Class Action, is *considered fraud, and in* Hazel-Atlas Glass Co. v. Hartford Empire Co., *322 U.S. 722, 64 S. Ct. 1281, 322 U.S. 233 (1944), "after discovered fraud warrants relief against a judgment regardless of the term at which it was finally entered."* Where there is fraud, res judicata does not apply. That is the reason why petitioner seeks due process evaluation of his Class B stocks.

Robert LeVasseur was also a Class B plaintiff in the same class action under Rule 23 Class Actions. *At the time of the Plan of Recapitalization, LeVasseur owned 3,000 Class A preferred shares and 336 shares of Class B common shares. He did not fairly and adequately protect the interests of the Class B stockholders.* His Class A $5 preferred stocks were converted share for share into new MPRR common stocks, and shares of new MoPac common stocks, now selling about $80 per share, or a total of about *$1,200,000.* The 3,000 Class A had a value of $100 per share, or a total of *$300,000. LeVasseu, as a representative party did not fairly and adequately protect the interests of the Class B stockholders,* according to Class Actions Rule 23(a)

Prerequisites to a Class Action. (4) "The representative parties will fairly and adequately protect the interests of the class," and (b) Class Actions Maintainable. "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied," which LeVasseur did not fairly and adequately protect the interests of the class he was supposed to be representing, the Class B stockholders. *This is fraud.* Where there is fraud, there is no res judicata.

The same conflict of interest under *Class Action Rule 23.1* had happened — by Betty Levin and Robert LeVasseur, who had asserted *certain claims derivatively on behalf of MoPac* (MPRR) at first. *Neither Robert LeVasseur nor Betty Levin, as Class B representatives, fairly and adequately protected the interests of the Class B stockholders.* Therefore, "The derivative action may not be maintained if it appears *that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.*" Neither of them made any effort to obtain any action from the directors or comparable authority or from the shareholders.

Therefore the derivative action under Class Action Rule 23.1 was not maintained. It appears that Betty Levin, the plaintiff who had brought the class action for better dividends, did not even vote her Class B shares in this class action that she brought about. It also appears from the voting record, that Robert LeVasseur did not vote his Class B shares in the class action. Therefore, I seek protection from injustice, by having my Class B shares evaluated under due process. I seek protection from plunderers of all kinds by having my MoPac Class B stocks evaluated by a jury trial in the United States District Court of New Jersey in Newark, New Jersey.

Therefore the *interests of the Class B shareholders were not fully and fairly represented in the prior litigation. The rights of Cl.B have not been terminated. The Class B certificates represent*

stock ownership in MPRR (MoPac). The Class B certificates evidence the right to due process evaluation under the Fifth and Fourteenth Amendments and Sec. 19a of the Act," Valuation of Property of Carriers, "to find true Class B value in order to exchange Class B into new MPRR common shares — value for value. *Therefore, Class B stock certificates have rights cognizable in the 1974 "Plan."* Class B certificates representing Class B MPRR equity-bearing common stocks must be evaluated by a jury in the lower court under due proces, acording to the Fifth and Fourteenth Amendments and by the lower court under Section 19a of the Act to *find Class B true value,* for its exchange into new MPRR common stocks.

Therefore, this MoPac stockholder prays that his Class B property be evaluated by a jury in the lower court under the Fifth and Fourteenth Amendments of the United States Constitution and according to Section 19a of the Interstate Commerce Act — "Valuation of property of carriers," to find the true value of his MoPac Class B shares so that he may become enabled to exchange the true value of his Class B shares for new MoPac common shares — *equal values given for equal values received in exchange,* which is according to *Schwabacher v. United States,* 334 U.S. 182 (1948) and *Otis and Co. v. S.E.C.,* 323 U.S. 624 (1945).

CONCLUSION

For the reasons stated herein and in the petition, it is respectfully requested that the writ be granted.

Respectfully submitted,

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Petitioner Pro Se